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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re MARK OUELLETTE, on Habeas Corpus.	B238365 (Los Angeles County Super. Ct. No. BH007839)

APPEAL from an order of the Superior Court of Los Angeles County. Patricia M. Schnegg, Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Jennifer A. Neill, Senior Assistant Attorney General, Anya M. Binsacca and Stacey D. Schesser, Deputy Attorneys General, for Appellant.

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Appellant Vimal Singh, Acting Warden of the California Medical Facility, appeals from the Los Angeles County Superior Court's November 11, 2011 order granting life prisoner Mark Ouellette's petition for writ of habeas corpus. The order reverses the decision of the Board of Parole Hearings denying parole to Mr. Ouellette.

Appellant contends that the superior court erred in reversing the Parole Board's decision because some evidence supports the Board's decision to deny parole to Mr. Ouellette. We affirm the superior court's order.

Background

On November 6, 1992, Mr. Ouellette killed two and a half year old Jacob, apparently by smothering him. Mr. Ouellette was living with Jacob's mother Veronica at the time. The autopsy showed that multiple traumatic injuries had been inflicted on Jacob in the last month of his life, including deep bruising, broken ribs and damages to his back. Witnesses reported that Jacob was afraid of Mr. Ouellette and would stay in his room for hours to avoid Mr. Ouellette. A witness also reported that Mr. Ouellette would squeeze Jacob's cheeks so hard that the child developed canker sores on the inside of his mouth. It appears that Jacob had been subjected to physical and mental abuse for about three months before his death.

Mr. Ouellette ultimately admitted to police that he had put his hand over Jacob's face and shook him until he stopped crying. He also admitted that he grabbed Jacob's face, told him to be quiet and smothered him. Mr. Ouellette pled guilty to second degree murder. He was sentenced to a term of 15 years to life in state prison. Mr. Ouellette was 23 years old at the time of the crime. He had no prior convictions. His minimum parole eligibility date was November 2, 2002.

In 2008, the Board granted parole to Mr. Ouellette. This decision was reversed by the Governor, on the ground that Mr. Ouellette lacked insight into the causes of his crime.

Mr. Ouellette's next parole hearing was in 2010. He was 42 years old at the time of the hearing, and had spent 18 years in prison. Mr. Ouellette explained the causes of his crime as follows: "I think the first time I was introduced to meth was late in high

school. And my drug use escalated to about a year and a half before the murder. I was using it daily." "I had a lot of pain in my life that I was making with drug use." "I think it originated with the absence of my father in my life, which is why I gravitated towards hanging around with older people." "I always had a void in my life with my father. I felt abandoned, you know. I never had answers to why my father was never a part of my life, and I stewed on that. And I believe when I got introduced to drugs, that was what I was using to fill that void." When asked why he took his anger out on Jacob, Mr. Ouellette replied: "I was a hurt person, and I wanted to hurt somebody." "It was just releasing aggression on somebody that I felt safe abusing him. I didn't think I was going to get caught."

Parole was opposed by the Los Angeles County Sheriff, the Los Angeles County District Attorney's Office and the victim's family. Four members of the victim's family spoke at the hearing: Jacob's father Mike Anneler; Jacob's grandmother Charlotte Navin; Jacob's mother Veronica Lindquist; and grandfather Ron Scott.

The 2010 Panel denied parole, primarily on the ground that Mr. Ouellette lacked insight into the reasons he committed the life offense, and so would pose an unreasonable risk of danger to society and a threat to public safety. The Panel found no other fault with Mr. Ouellette, and commended him for his positive programming, stating: "Your programming excels above most other inmates. And we acknowledge that. You've reduced your custody and your classification levels as low as you can. You've completed vocational programs, and then you continued to excel in those programs even after completing them, like welding where you continue to weld after you've finished. You've maintained an excellent work record in just about every job I could find on record. You attended college, taken college classes on more than one occasion, and you've made a legitimate effort to complete the college. And you've participated in numerous self-help. We discussed some of the recent self-help today, but the record shows that you've been attending self-help for a long time. And then you've continued on and actually continued to help others through facilitating in those programs and serving as a secretary and so on, as evidenced with the New Beginnings that we talked about today and your secretary in

AA or NA. And we acknowledge all that. And you've done all this and managed to maintain disciplinary free."

The Panel also noted: "To me, it looks like [your family has] always been pretty supportive of you through this whole process. That's wonderful. . . . We looked at that, and we found that as a positive for you." The Panel commended Mr. Ouellette's parole plans, stating: "And you've made some really wise decisions with regard to your possible parole date at some point. And that being to go to a transitional living home. I mean that is a selfless kind of a decision that this Panel does recognize as something that would be very good for you to, as it suggests, transition back out."

Mr. Ouellette's 2008 psychological report found that he is an overall low risk of future violence. The report found that Mr. Ouellette's level of insight was "excellent," he was an excellent prisoner and accepted responsibility for his actions. The psychologist found that Mr. Ouellette had matured significantly in prison, was remorseful, and had done "everything in his power to improve himself." The psychologist opined that Mr. Ouellette had a strong commitment to sobriety and will likely do well if released on parole.

Mr. Ouellette's previous report, from 2001, was equally positive. That report states that Mr. Ouellette "has matured in a very pro-social directions during the period of his incarceration" and his "level of insight, remorse and empathy is impressive." The report found that Mr. Ouellette had "excellent self-control" and the "ability to function cheerfully and successfully without relying upon illegal substances." The report concluded that Mr. Ouellette "appears to be a rehabilitated person" and if he were released "it is very likely that he would continue to be violence-free and maintain his very constructive and socialized behavior developed through his positive programming at CDC."

Discussion

Appellant contends that some evidence supports the Panel's decision to deny parole, and so the decision of the superior court reversing the Panel must be reversed. We do not agree.

The trial court's findings were based solely upon documentary evidence. Accordingly, we independently review the record. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.)

In determining whether to release a life inmate to the public, the parole authority considers "[a]ll relevant, reliable information available" and any "information which bears on the prisoner's suitability for release." (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

"[W]hen a court reviews a decision of the Board or the Governor [denying parole], the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212.) "This standard is unquestionably deferential, but certainly is not toothless." (*Id.* at p. 1210.)

"The 'some evidence' standard is intended to guard against arbitrary parole decisions." (*In re Shaputis* (2011) 53 Cal.4th 192, 215 (hereafter *Shaputis II*).) A reviewing court must uphold the Board's decision "unless it is arbitrary or procedurally flawed." (*Id*. at p. 221.)

1. Commitment offense

There is some evidence to support the Panel's finding that Mr. Ouellette's commitment offense was especially heinous, atrocious, or cruel. The record shows that Mr. Ouellette abused the vulnerable victim over several months before killing him.

The Board may base a denial of parole upon the circumstances of the offense only if the facts are probative of the "ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221.)

Where, as here, the life prisoner has served more than his suggested base term, the circumstances of the life offense will rarely support a finding of unsuitability for parole. (*Id.* at p. 1211.)

Here, the Board found: "The offense was carried out dispassionately. Certainly, it was done over a prolonged period of time. You didn't have any prior record, which is a good thing for you. You admitted to it relatively quickly after the initial, you know, playing the game. So we did not find your prior record was a problem."

2. Lack of insight

An inmate's failure to gain insight into his crime despite years of rehabilitative programming may indicate a current risk of danger. (See *In re Shaputis* (2008) 44 Cal.4th 1241, 1260 (hereafter *Shaputis I*).)

The Panel told Mr. Ouellette: "The biggest problem that we had was the insight and the lack of connecting the dots."

The Panel explained: "[We] just didn't hear why there was so much rage. You had virtually no violence that we could see, virtually no violence prior to the crime, and virtually no violence after the crime. It's this one circumstance that we are dying to have an explanation for. And we simply didn't get it today."

In fact, Mr. Ouellette provided an explanation for the crime at the hearing. Mr. Ouellette explained he had a lot of pain from his abandonment by his father and felt a void in his life. He explained that he hurt the victim because "I was a hurt person, and I wanted to hurt somebody." He picked the child to hurt because he thought he would not be caught. "It was just releasing aggression on somebody that I felt safe abusing him. I didn't think I was going to get caught." He was a long-time drug user and he believed that his drug abuse affected his behavior and contributed to his loss of control and violence.

The Panel rejected this explanation, opining: "It seems to me that the issue with regard to your father leaving at a very young age, and I didn't get the sense, the understanding, nor the reasoning from you that it was anything more than just, you know,

the unfortunate reality of what society faces today in just divorce, that you met him some time later. We just didn't get the sense that you had the depth of understanding that would vault you from being upset over your dad and mom breaking up, namely your dad, vaulting it to killing a child years later."

There is no evidence to support the Panel's apparent belief that a child cannot be deeply hurt by "the unfortunate reality" of "just divorce" or that such hurt cannot result in the child later inflicting physical pain on another child. There is also no evidence to support the Panel's statement that what Mr. Ouellette experienced was "just divorce" or that he was just "upset over [his] dad and mom breaking up." Mr. Ouellette stated that his pain was caused by his father's complete abandonment of him when Mr. Ouellette was a year old. Mr. Ouellette saw his father only two times in his entire life.[1] He did not say that he was "upset" by this. He described a "void" in his life, feeling a lack of self-worth and feeling deep emotional pain. In his 2001 evaluation, that state psychologist wrote that Mr. Ouellette reported "a significant amount of emotional pain in relation to his father never being present in his life." While the state psychologist did not directly address this statement, the psychologist reported that "there was no indication of any problems [with Mr. Ouellette] concerning appropriate contact with reality." The psychologist opined that Mr. Ouellette's "insight is excellent and his judgment and common sense are more than competent." The psychologist found "no indication of any need for psychological counseling." Thus, clearly, the psychologist found Mr. Ouellette's claim of a "significant amount of emotional pain" to be based in reality and to be a reasonable response to abandonment. For the Panel to disregard this assessment and take the position, unsupported by any evidence in the record, that the events of Mr. Ouellette's

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[1] Mr. Ouellette saw his father once in a chance encounter in a store when he was visiting relatives. Mr. Ouellette was six or seven years old. His mother introduced him to his father and "we shook hands and that was it." The next time Mr. Ouellette saw his father when he was 15 years old. His father invited him to come for a visit the next year. So, when Mr. Ouellette was 16 years old, he went to stay with his father. The visit did not go well and lasted only two weeks. That was the last time Mr. Ouellette ever spoke with his father.

childhood could not possibly have caused significant pain to him is arbitrary and capricious.

Appellant suggests that the Panel found that Mr. Ouellette's discussion of his drug use did not sufficiently explain the murder. Appellant contends that Mr. Ouellette never explained why "his substance abuse gave way to his rage and brutality." We see no statements by the Panel addressing Mr. Ouellette's explanation of the role of drugs in the murder. The Panel did state that "It seems as though certainly, drugs, alcohol, and in this case meth is certainly a lubricant. And it gets people to do the kinds of things they would not normally do." Thus, both appellant and the Panel appear to believe that the drugs Mr. Ouellette used simply removed his inhibition and permitted him to act on his violent impulses. They seem to believe that there must have been some pre-existing rage or brutality that the drugs released.

There is no evidence in the record to support the view that methamphetamine is simply a "lubricant." The only evidence of the effects of methamphetamine comes from the report of the state psychologist who examined Mr. Ouellette in 2001. The psychologist explained: "It is well documented that methamphetamine dependence leads to irritability and volatile mood swings, which frequently leads to dangerous aggression." Thus, methamphetamine *creates* anger and aggression in a user, it does not simply remove the user's inhibitions and allow him to act on pre-existing anger and aggressive impulses. The psychologist opined: "In sum, his mental condition, based upon his substance abuse, was a primary factor in his homicidal behavior." It was arbitrary and capricious for the Panel to reject the psychologist's explanation of the "well documented" effects of methamphetamine and rely on their own belief, unsupported by any evidence, that methamphetamine is a "lubricant."

Appellant also suggests that drug abuse cannot provide an explanation for the crime because "while many suffer from addiction, not every addict reacts or behaves as Ouellette did when he was under the influence." We fail to see the significance of the fact that not every drug addict commits a murder. Some do. Mr. Ouellette has explained

why he committed a murder.[2] He cannot possibly be expected to explain why other addicts do not.

Mr. Ouellette's explanation of his mental state and motivation are entirely consistent with the record, entirely plausible and do not reflect a lack of insight. There are no material factual discrepancies between the evidentiary record and Mr. Ouellette's account of his conduct and its causes. It appears that the lack of insight conclusion by the Board is equivalent to a mere refusal to accept evidence that Mr. Ouellette has acknowledged the material aspects of his conduct and offense, shown an understanding of its causes, and demonstrated remorse. (*In re Ryner* (2011) 196 Cal.App.4th 533, 549.)

Even assuming that there was some evidence to support the Panel's finding that Mr. Ouellette had only limited insight into the reasons for his pain and anger, there is no evidence that such limited insight makes him a current risk to public safety. Lack of insight supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness. (*Shaputis II*, *supra*, 53 Cal.4th at p. 219.)

The Panel did not consider whether any limitations in Mr. Ouellette's insight into the causes of his anger showed that he was currently dangerous, much less explain how limited insight made Mr. Ouellette currently dangerous.

The Panel believed that Mr. Ouellette's crime was caused by his anger, and Mr. Ouellette acknowledged that anger was a major contributory factor in the crime. Mr. Ouellette explained at length and in detail how he addressed the anger in his life. Mr. Ouellette elaborated: "I lacked the ability to empathize and sympathize. I work a 12-step program. I put myself in other people's shoes when I'm confronted with situations. And that's how I've learned to empathize and sympathize. . . . I'm not an angry person anymore." Mr. Ouellette also took Anger Management classes and read Anger Management books. He explained that "I've learned to accept setbacks and disappointments without being angry about it. I accept life on life's terms. I couldn't do

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[2] Not incidentally, Mr. Ouellette's explanation of the crime was not limited to his methamphetamine use, but also included other factors such as his emotional state while using methamphetamine.

that before." He clarified that he does still get angry about some things, such as the Governor's reversal of his previous grant of parole, but "I don't stew on anger. I address my anger. I find out the true cause of my anger, and I move forward. I do something positive in its place." When he learned about the reversal, he didn't "choose a destructive action. I was angry about it, and I chose to do something positive and get involved in another self-help group and work through it. Whatever setbacks I have, I work through it."

Mr. Ouellette never received a disciplinary CDC-115 in prison. His 2008 evaluation found that Mr. Ouellette "has maintained good control over his impulses while in prison. He has not been prone to angry outbursts or self-destructive behavior while in the CDCR." The psychologist opined that Mr. Ouellette "has coped well with prison stressors." The psychologist noted that Mr. Ouellette "does not present as angry or negative in any way."

Even assuming for the sake of argument that Mr. Ouellette did not fully understand the source of his anger at a child twenty years ago and that this lack of insight meant that he might become angry in some point in the future, there is no evidence that such anger would make him a danger to society. The evidence shows that Mr. Ouellette has learned to manage his anger in a constructive way. In light of Mr. Ouellette's demonstrated ability to recognize and deal with his anger under stressful situations, some limitation in his insight as to the childhood roots of his anger is not a rational indicator that Mr. Ouellette would unreasonably endanger public safety if released. (*In re Rodriguez* (2011) 193 Cal.App.4th 85, 99-100.)

Disposition

The trial court's November 11, 2011 order granting Mr. Ouellette's petition for writ of habeas corpus is affirmed. The Board is ordered to vacate its decision denying parole and thereafter conduct a new parole hearing for Mr. Ouellette within 120 days, in accordance with this opinion and *In re Prather* (2010) 50 Cal.4th 238.

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ARMSTRONG, J.

I concur:

KRIEGLER, J.

I concur in the judgment granting the habeas corpus petition. I would issue the writ of habeas corpus solely on the ground the findings of the Board of Prison Terms (the board) do not support the March 8, 2010 order. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1207; *In re Dannenberg* (2005) 29 Cal.4th 1061, 1094-1096, fn. 16.) The board could have viewed the prisoner's explanation the killing was inextricably related to his drug addiction as evidence of a lack of insight. (*In re Shaputis* (2011) 53 Cal.4th 192, 216; *In re Mims* (2012) 203 Cal.App.4th 478, 488.) Drug addicts rarely, if ever, kill young children. But here the board, in its findings and interactions, credited the prisoner's explanation of the relation of his drug use to the killing as entirely truthful. Under these circumstances, relating drug addiction to once in a lifetime conduct can be viewed as evidence of *keen* insight. And even if the prisoner lacks insight, the board could find he is not a serious threat to public safety. My point is the board is the arbiter of whether the drug usage explanation is evidence of insight. Here, the board's findings do not support an absence of insight finding. Further, the board never found this was one of those rare cases where the existence of a single isolated fact could possibly be sufficient to support a future dangerousness finding. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1214; see *In re Prather* (2010) 50 Cal.4th 238, 255.) Finally, I commend both counsel for their principled, ethical and prompt briefing. It is appreciated.

TURNER, P. J.